Supreme Court, U.S.
FILED

94 789 NOV 1 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GERARD E. TANNER,

Petitioner,

vs.

COURT OF CLAIMS, EACH OF THE JUSTICES LISTED INDIVIDUALLY, ANDREW M. RAUCCI, JAMES S. MONTANA, JR., ANNE M. BURKE, AND KIRK W. DILLARD,

Respondents.

Petition For Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED FOR REVIEW

May the Illinois Court of Claims disregard the due process clause of the Fourteenth Amendment and deny a litigant the right to a meaningful hearing?

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In The

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GERARD E. TANNER,

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COURT OF CLAIMS, EACH OF THE JUSTICES LISTED INDIVIDUALLY, ANDREW M. RAUCCI, JAMES S. MONTANA, JR., ANNE M. BURKE, AND KIRK W. DILLARD,

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The Petitioner, Gerard E. Tanner, respectfully requests this Court to issue a Write of Certiorari to review the Order of the Illinois Supreme Court entered in this action on August 3, 1994.

OPINIONS BELOW

The Summary Order of the Illinois Supreme Court in *Tanner v. Court of Claims, etc. et al.*, No. 76953 (Ill. Aug. 3, 1994) is reproduced in the Appendix at App. 1. The

Opinion of the Illinois Appellate Court (4th Dist. 1994), 256 Ill.App. 3d 1089, 196 Ill.Dec. 151, 629 N.E. 2d 696 is reproduced in the Appendix at App. 2. The Order of the Trial Court dismissing the case is also reproduced in the Appendix at App. 8. The Opinion Upon Denial of Petition for Rehearing of the Court of Claims is reproduced in the Appendix at App. 10. The Opinion of the Court of Claims is reproduced in the Appendix at App. 13.

JURISDICTION

On August 3, 1994, the Illinois Supreme Court, on the Court of Claims' Motion for Reconsideration of the Order denying leave to appeal, allowed the Motion for Reconsideration, vacated its previous Order denying leave to appeal, vacated the judgment of the Illinois Appellate Court, and directed the Appellate Court to enter an Order affirming the judgment of the Circuit Court. This Court has jurisdiction to review, by way of Writ of Certiorari, the Summary Order of the Illinois Supreme Court. 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Fourteenth Amendment:

Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 4, 1975, the Petitioner filed a two-Count Complaint in the Circuit Court of Cook County against the Board of Trustees of the University of Illinois. The Petitioner sought a Writ of Mandamus compelling the University to issue to Petitioner a Doctor of Philosophy Degree in Business Administration. In a separate Count, he sought damages on a breach of contract claim for the failure of the University to act in accordance with its agreement with the Petitioner.

On Motion made by the University, venue was changed on September 29, 1975, from Cook County to the Sixth Judicial Circuit in Champaign County. The Circuit Court of Champaign County dismissed the Petitioner's claims on February 13, 1976, stating that there were no set of facts that could be proved to support the Petitioner's theories of mandamus and contract.

On May 16, 1977, the Appellate Court for the Fourth District of Illinois reversed in part the Circuit Court decision in *Tanner v. The Board of Trustees of the University of Illinois* (4th Dist. 1977), 48 Ill.App. 3d 680, 6 Ill.Dec. 679, 363 N.E. 2d 210. Specifically, the Appellate Court found

that the Circuit Court had jurisdiction over the mandamus action but that the Circuit Court lacked jurisdiction over the breach of contract action. The Court stated such breach of contract action must be brought in the Court of Claims.

> Since the Plaintiff in the instant case is attempting to hold the State liable for money damages on a theory of implied contract, we hold that the Plaintiff's contract claim against the State was improperly filed in the Circuit Court.

Tanner, 48 Ill.App. 3d 680, 6 Ill.Dec. 679, 681, 363 N.E. 2d 210.

On June 28, 1978, the Petitioner commenced an action in the Illinois Court of Claims entitled *Gerard E. Tanner, Claimant v. The Board of Trustees of the University of Illinois, a Public Corporation, Respondent,* Cause Number 78-CC-1107 for the purpose of hearing a breach of contract claim against the Respondent University. On December 8, 1986, and December 9, 1986, a hearing was held before Commissioner Parsons of the Court of Claims regarding the breach of contract claim against the Respondent University. Petitioner presented evidence before Commissioner Parsons, and in turn, the Commissioner made a report and recommendation to the Court of Claims based upon the evidence that was heard.

Prior to rendering any decision, the Court of Claims lost the report recommendations and findings of Commissioner Parsons, and Commissioner Parsons made no copy of his report. Petitioner filed a Motion with the Court of Claims which sought Commissioner Parsons' trial notes and all notes used in the preparation of the original report which was transmitted to the Court of

Claims and which was subsequently lost by the Court of Claims. The Court of Claims denied this Motion.

On May 9, 1989, approximately 2½ years after the hearing, a decision was rendered by the Court of Claims against the Petitioner. In its ruling, the Court of Claims did not address the contract claims of the Petitioner but simply adopted the findings and rulings of the Circuit Court in which the mandamus action was tried and held that:

> In the absence of malicious conduct, or arbitrary and capricious action, Claimant cannot recover. . . . We come to the same conclusion as to (sic) the Circuit and Appellate Courts.

On June 7, 1989, a Petition for Rehearing was filed by Petitioner. The Court of Claims denied Petitioner's request for rehearing on December 7, 1990.

On June 6, 1991, the Petitioner filed his Petition for Writ of Certiorari in the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois. The Respondents filed a Motion for Change of Venue, and the case was transferred to the Circuit Court of Sangamon County, Illinois, on March 3, 1992. In his Petition for Writ of Certiorari, the Petitioner specifically alleged three separate Fourteenth Amendment due process violations for which he sought redress in the Circuit Court of Sangamon County. The Respondents filed a Motion to Dismiss with accompanying Memorandum of Law on May 15, 1992. The Petitioner filed a Memorandum in Opposition thereto on January 25, 1993. A hearing was held on the Motion to Dismiss on February 23, 1993. The Circuit Court rendered its decision in memorandum form on

February 24, 1993, granting the Motion to Dismiss. The Petitioner filed his Notice of Appeal on March 3, 1993. In its decision of February 3, 1994, the Appellate Court reversed the decision of the Circuit Court and ordered the Circuit Court to issue the Writ of Certiorari, and "upon its return by the Court of Claims, to determine whether the alleged due process violations are supported by the record of proceedings from the Court of Claims." (Opinion Page 7)

The Court of Claims filed its Petition for Leave to Appeal to the Illinois Supreme Court on March 10, 1994, and its Motion for Leave to Cite Additional Authority on April 11, 1994. On June 2, 1994, the Supreme Court of Illinois denied the Petition for Leave to Appeal. The Court of Claims filed a Motion for Reconsideration on June 13, 1994. On August 3, 1994, the Illinois Supreme Court, without argument, briefing, or notice allowed the Motion for Reconsideration, vacated its previous Order denying leave to appeal, vacated the judgment of the Illinois Appellate Court, and directed the Appellate Court to enter an Order affirming the judgment of the Circuit Court.

REASONS FOR GRANTING THE PETITION

A Petition for Writ of Certiorari is granted by this Court " . . . when there are special and important reasons therefore." Supreme Court Rule 10.1. Review may be granted when a State Court of last resort has "decided a federal question in a way that conflicts with applicable decision of this Court." *Id.*

Almost thirty years ago, this Court found that it is a basic tenet of constitutional law that an opportunity to be heard be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62, 66. The Illinois Supreme Court subscribed to this principle when it rendered its Opinion in *Rosetti Contracting Co. v. Court of Claims* (Ill. 1985), 109 Ill. 2d 72, 92 Ill.Dec. 521, 523, 485 N.E. 2d 332.

In the case before this Court, the Illinois Supreme Court, without explanation or warning, abandoned its decision in *Rosetti, supra,* when it summarily disposed Tanner's appeal. Tanner's right to a meaningful hearing within the scope of the due process clause of the Fourteenth Amendment was trampled upon.

This Court should seize this opportunity to remind the states and the lower courts that an individual's constitutional due process rights are not easily ignored or abandoned.

I

TANNER NEVER RECEIVED A MEANINGFUL HEARING BEFORE THE ILLINOIS COURT OF CLAIMS

A. Petitioner was denied due process guaranteed by the Fourteenth Amendment to the United States Constitution and the Illinois State Constitution under Article 1, Section 2, in the following respects:

a. Petitioner was denied due process by the Court of Claims in its refusal to order the trial notes of Commissioner Parsons turned over to Petitioner. Such notes were essential

to the report upon which the Court of Claims based its decision.

b. The Court of Claims failed to address any of the precise issues raised by Petitioner in the Court of Claims' proceeding. Specifically, Petitioner raised six issues in the breach of contract claim;

1. Did the University fail to provide a timely preliminary examination?

2. Did the University fail to treat the Claimant fairly and consistently in the way it treated other students in Claimant's program?

3. Did the University destroy Mr. Tanner's dissertation and other documents related to his progress at the University?

4. Did the University fail to provide faculty guidance and leadership?

5. Did the University breach its agreements as expressed in Kenneth Uhl's letter of December 17, 1973?

6. What was the nature and extent of Plaintiff's damages?

c. The Court of Claims, in rendering its decision, extensively cited the separate mandamus action which contained a much higher burden of proof than the breach of contract claim. Specifically, the Court of Claims found that in the absence of malicious conduct or arbitrary and capricious actions, the Petitioner could not recover. In applying such a mandamus standard, the Court of Claims denied Petitioner his due

> process rights to have his breach of contract claim heard and have the appropriate judicial standard applied to such breach of contract claim.

B. The trial court could not adequately rule without a review of the Court of Claims' record. While the trial court in its Memorandum Opinion acknowledged that under *Rossetti* a claimant has a right to seek a review of Court of Claims' decisions denying the defendant due process, the trial court narrowly construed *Rossetti* to only require that a hearing be conducted and not to require that due process occur during the hearing or decision making process itself.

> While the Petitioner alleges a violation of his Due Process rights a consideration of his Petition for Writ as well as the supporting documents establishes that he seeks a review of the Court of Claims' decision on its merits. In *Rossetti v. Court of Claims*, 109 Ill. 2d 72, 485 N.E.2d 332 the Illinois Supreme Court allowed a Writ of Certiorari to require the Court of Claims to conduct a hearing. Once a hearing is held however the decision of the Court of Claims is not reviewable in the Circuit Court (*Memorandum Opinion, p. 4).*

Although the facts in *Rossetti* only required the Illinois Supreme Court to determine that the claimant be allowed to have a hearing consistent with due process requirements, the Supreme Court did not limit its decision simply to the right to be heard. In fact, the *Rossetti* court based its decision on *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) when it stated:

> It is a basic tenet of constitutional law that an opportunity to be heard be granted at a meaningful time and *in a meaningful manner* (emphasis added).

If this Court were to follow the ruling of the trial court, it would conclude that so long as a hearing is granted, the Court of Claims is free to do anything and everything it wishes notwithstanding any constitutional due process rights that a claimant may have. The Petitioner submits that *Rossetti* does not go that far and that the Illinois Supreme Court has indicated that to the extent there are due process violations claimed, a litigant is entitled to appellate review.

> It is also clear that this court has the authority and the responsibility, as the final arbiter of the Constitution, to determine whether the Court of Claims has acted to unconstitutionally deprive a party of its right to due process.

Rossetti (Ill. 1985) 109 Ill. 2d 72, 92 Ill.Dec. 521, 523, 485 N.E. 2d 332.

There is no language in the opinion limiting the right of due process solely to a hearing.

In the case at bar, the Petitioner specifically alleges that there occurred three separate due process violations entitling him to seek a Writ of Certiorari to review the decision of the Court of Claims. The trial court did not have the benefit of the pleadings and evidence presented to the Court of Claims to familiarize itself with the facts to fully evaluate the Petitioner's position that due process constitutional rights were, in fact, violated by the Court of Claims. It is precisely that inquiry which the Petitioner

sought from the trial court by virtue of the Writ of Certiorari. The trial court could not determine without a hearing if, in fact, the Court of Claims' failure to address any of the issues raised by the Petitioner rose to a level of a due process violation.

C. The decision of the Fourth District Appellate Court was correct.

Since there was no record from the Court of Claims filed in the Circuit Court for the court to review, the dismissal by the Circuit Court of the Writ of Certiorari was in error. As the Fourth District stated:

> The common law writ of *certiorari* was developed to provide a means whereby a petitioner who was without avenue of appeal or direct review could obtain limited review over action by a court or other tribunal exercising quasi-judicial functions. [Citation.] The purpose of the writ was, and is, to have the entire record of the inferior tribunal brought before the court to determine, from the record alone, whether that body proceeded according to the applicable law. If the circuit court, on the return of the writ, finds from the record that the inferior tribunal proceeded according to law, the writ is quashed; however, if the proceedings are not in compliance with the law the judgment and proceedings shown by the return will be quashed. (*Stratton v. Wenona Community Unit District No. 1* (Ill. 1990), 133 Ill. 2d 413, 427, 141 Ill.Dec. 453, 551 N.E. 2d 640, 645.)

Appellate Opinion p. 4.

Without the record of the Court of Claims, there was simply no way for the Circuit Court to determine if Petitioner's due process rights had been trampled upon.

D. The handling of the case by the Illinois Supreme Court so violates the holding of *Armstrong* that it cannot go unchallenged.

In *Armstrong*, a father whose parental rights to his only child were stripped by an order of adoption by the new husband of the mother of the child, was not accorded even the barest of notice and due process when his rights were stripped. Armstrong and his wife were divorced by a Texas court. A few years later, the wife married Salvatore Manzo who filed a petition for adoption of the only child of Armstrong. While normally notice to the father would be given, there were exceptions permitted, one of which was if the father did not contribute substantially to the support of the child commensurate with his financial ability. The notice that might have been given to the father was instead given to a Juvenile Court Judge who consented to the adoption without a hearing, based upon the affidavit of the mother. With consent in hand, the Manzos then filed an adoption petition indicating that the father had not substantially contributed to the support of the child commensurate with his ability to do so for a period in excess of two (2) years. Without notifying the father of the filing of the petition or of any hearing, the adoption decree was entered after an investigation ordered by the Court.

The father found out about the adoption through the child's grandfather and promptly filed a petition asking that the adoption decree be annulled and a new trial

granted. A hearing on the father's motion was set at which he introduced evidence that he had contributed to the support of the child. The trial court denied his motion. On appeal, the Appellate Court upheld the decision, and the Supreme Court of Texas refused an application for writ of error.

The United States Supreme Court held that:

> a fundamental requirement of due process is (the opportunity to be heard). [Citation]. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the Petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the Petitioner to the position he would have occupied had due process of law been accorded him in the first place.

380 U.S. at 552.

While in *Armstrong* there was no notice of hearing, in the case at bar, the failure of the Illinois Court of Claims to adequately address or resolve the six specific issues raised and to apply the wrong standard of review, just as effectively deprived Tanner of due process. It is only through a review of the *record* of the Court of Claims that it can be adequately determined whether Tanner's due process rights were violated. Since the trial court decided the case based upon a motion to dismiss, it did not yet have the complete record of the Court of Claims. The Appellate Court recognized this when it remanded the case back to the trial court for an examination of the record from the Court of Claims.

As this Court has stated before, "due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance. [Citation]. Due process is flexible and calls for such procedural protection as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 333, 334 (1976). The Court of Claims, by not addressing the specific issues and applying the wrong standard, failed to grant Tanner "an opportunity to be heard in a meaningful manner."

II

THE ILLINOIS SUPREME COURT SUMMARILY DISPOSED TANNER'S APPEAL WITHOUT NOTICE, BRIEFING, OR THE OPPORTUNITY TO BE HEARD

A. The Motion for Reconsideration filed by the Court of Claims in the Illinois Supreme Court asked for reconsideration of the right to be heard. For the Illinois Supreme Court to vacate the decision of the Appellate Court without benefit of notice, briefing, or argument denigrates the right of Petitioner to obtain a meaningful hearing just as certainly as did the Court of Claims' decision.

B. There was no notice to Tanner that the Illinois Supreme Court was considering disposing of the entire claim in response to a Motion for Reconsideration. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Mathews*, 424 U.S. at 333, citing to *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The Court of

Claims' brief in support of its Motion for Reconsideration to the Illinois Supreme Court concentrated on the burden to the court system which would be imposed by review of Court of Claims' decisions. Prior decisions of this Court identify three specific due process considerations:

> 1. the private interest that will be affected by the official action;
>
> 2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> 3. the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

The Illinois Supreme Court, by vacating the decision of the Appellate Court and affirming the decision of the trial court, bases its decision upon the burden to the government only. It reversed its previous decision only after the Court of Claims brought up the specter of increased burden to the court system. That is not the only consideration, however. The private interest to be affected and the risk of an erroneous deprivation must also be considered.

C. Since the Illinois Supreme Court did not notify Tanner that it might dismiss his claim in its entirety, there was no opportunity for Tanner to be heard, to argue or even to brief this issue. There was no hearing by the Illinois Supreme Court affording Tanner argument, only the Petition for Reconsideration by the Court of Claims.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.

Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 84 (1988) citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

D. The decision of the Illinois Supreme Court is inconsistent with the mandate of the U.S. Supreme Court and further compounds the deprivation of Tanner's due process rights guaranteed by the Fourteenth Amendment.

CONCLUSION

Before any person's property rights can be denied, one must be afforded a meaningful forum to be heard. It is that fundamental process that is due all persons.

The Illinois Court of Claims has violated that basic tenet. The Illinois Supreme Court has sanctioned the violation. The Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX A

No. 76953

IN THE
SUPREME COURT OF ILLINOIS

GERALD [sic] E. TANNER, Respondent, vs. COURT OF CLAIMS, etc., et al., Petitioners.	Appeal, Appellate Court Fourth District AC4-92-0209 Circuit Court of Sangamon County Honorable Stuart H. Shiffman, Judge Presiding.

ORDER

(Filed Aug. 3, 1994)

This cause coming to be heard on the petitioners' motion for reconsideration of the order denying leave to appeal, due notice having been given to the respondent, and the court being fully advised in the premises;

IT IS ORDERED that the motion for reconsideration is *allowed*. This court's order of June 2, 1994, denying leave to appeal is *vacated*. The petition for leave to appeal is *allowed*. In the exercise of this court's supervisory authority the judgment of the Appellate Court, Fourth District, No. 4-93-0209, is *vacated*. The appellate court is directed to enter an order affirming the judgment of the circuit court.

APPENDIX B

NO. 4-93-0209

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

GERRARD [sic] E. TANNER, Plaintiff-Appellant, v. COURT OF CLAIMS, each of the Justices listed individually, ANDREW RAUCCI, JAMES A MONTANNA [sic], JR., ANNE M. BURKE and KIRK W. DILLARD, Defendant-Appellee.	)	Appeal from Circuit Court of Sangamon County No. 92L102 Honorable Stuart H. Shiffman, Judge Presiding

(Filed Feb. 3, 1994)

JUSTICE KNECHT delivered the opinion of the court:

Plaintiff filed suit in the Court of Claims alleging the University of Illinois breached its contract with him when it failed to award him a Ph.D. The claim was denied and plaintiff sought a writ of *certiorari* from the circuit court contending his due process rights were violated by the Court of Claims during its deliberative process. On motion of the defendants, the petition for issuance of the writ was dismissed. On appeal, plaintiff contends the trial court erred in dismissing the petition prior to examining the record of proceedings made before the Court of Claims. Because we agree the petition was improvidently dismissed we decline, with one exception, to address the

substantive issues plaintiff raises concerning the merits of the alleged due process violations committed by the Court of Claims.

This tortuous litigation began in 1975 when plaintiff filed a two-count complaint against the University of Illinois (University) after it refused to award him a Ph.D. in business. Plaintiff sought an order of *mandamus* directing that the University issue the degree and monetary damages. On appeal from the dismissal of both counts, this court reversed the *mandamus* count but affirmed the dismissal of the money damages claim on the basis that such an award could only be made by the Court of Claims. *Tanner v. Board of Trustees* (1977), 48 Ill. App. 3d 680, 363 N.E.2d 208 (*Tanner I*).

On remand, the circuit court concluded *mandamus* would not lie because plaintiff failed to demonstrate the University acted maliciously or in bad faith or that it arbitrarily and capriciously refused to award the degree. That decision was affirmed on appeal. *Tanner v. Board of Trustees* (1984), 121 Ill. App. 3d 139, 459 N.E.2d 324 (*Tanner II*).

Following our opinion in *Tanner II*, plaintiff commenced this action in the Court of Claims alleging breach of contract. Although an evidentiary hearing before a commissioner was held in 1986, the report and recommendation of the commissioner to the full Court of Claims was lost. By motion, plaintiff sought the commissioner's original trial notes and all notes used in the preparation of the missing report. The Court of Claims denied this motion and the commissioner apparently prepared a substitute report since he did not retain a copy of

his original. On May 9, 1989, approximately 2½ years after the original hearing, plaintiff's claim was denied.

Plaintiff then filed his petition for writ of *certiorari* in Champaign County, which was transferred to Sangamon County on defendants' motion for change of venue on March 3, 1992. The single-count petition alleged plaintiff was entitled to access to the original notes of the hearing commissioner, the Court of Claims failed to address six specific issues plaintiff raised, and the Court of the [sic] Claims decision relied upon an incorrect standard of proof.

Defendants filed a motion to dismiss which the circuit court granted. In so doing, the court concluded that although plaintiff was alleging a violation of due process rights, in reality, he was seeking a prohibited review of the merits of the underlying decision of the Court of Claims. Except for the decision of the Court of Claims and several other short documents attached as exhibits to the petition, none of the record before the Court of Claims was ever filed or made a part of the circuit court proceedings.

Plaintiff's initial contention is the trial court's ruling cannot be sustained because there was no record from the Court of Claims filed in the circuit court for the court to review to determine whether plaintiff's due process rights were violated. We agree.

The principles applicable to *certiorari* practice have been set forth by the supreme court. Most recently, the court stated:

> "The common law writ of *certiorari* was developed to provide a means whereby a petitioner

> who was without avenue of appeal or direct review could obtain limited review over action by a court or other tribunal exercising quasi-judicial functions. [Citation.] The purpose of the writ was, and is, to have the entire record of the inferior tribunal brought before the court to determine, from the record alone, whether that body proceeded according to the applicable law. If the circuit court, on the return of the writ, finds from the record that the inferior tribunal proceeded according to law, the writ is quashed; however, if the proceedings are not in compliance with the law the judgment and proceedings shown by the return will be quashed." (*Stratton v. Wenona Community Unit District No. 1* (1990), 133 Ill. 2d 413, 427, 551 N.E.2d 640, 645.)

When confronted with a complaint for common law *certiorari,* the court has only two powers, mainly, to quash the proceeding or to quash the writ and dismiss the petition. (*People v. Fisher* (1940), 373 Ill. 228, 230, 25 N.E.2d 785, 786.) The issues cannot be tried on allegations contained in the petition or on any facts except on the record of the proceedings as returned. (*Hine v. Roberts* (1923), 309 Ill. 439, 447, 141 N.E. 166, 169.) Addressing the confusion that sometimes accompanies the terminology of *certiorari* proceedings, one text offers the following:

> "The terms 'quashal' and 'dismissal' are used interchangeably; but a distinction has been made between quashing or dismissing the writ and superseding it, in that the writ is quashed or dismissed only after the return has been made, while it is superseded before the return.
>
> In other words, according to this distinction, after the return of the writ the proper

> practice is to move to quash or dismiss the writ; but, although the writ has been served, if it has not been returned, it is not before the court and cannot be quashed and the proper practice is to move to supersede it." (14 C.J.S. *Certiorari* § 73, at 107 (1991).)

Where a plaintiff brings into issue the alleged violation of his procedural and substantive rights, the petition is not subject to dismissal, as such issue cannot be determined as a matter of law upon the bare allegations of the petition. 14 C.J.S. *Certiorari* § 76, at 111 (1991).

The common theme in each of these principles is that the record from the inferior tribunal must normally be made a part of the trial court record for the court to review. In this case, the record before the Court of Claims was never filed in the circuit court because the petition for writ of *certiorari* was dismissed before the writ was ever issued.

We recognize the issuance of a writ of *certiorari* is within the discretion of the court (*Stratton*, 133 Ill. 2d at 428, 551 N.E.2d at 646) and there may be instances when the writ is properly denied if, as a matter of law, the court is able to determine plaintiff cannot prevail or he is not entitled to the review he seeks. (See *Deslauries v. Soucie* (1906), 222 Ill. 522, 524, 78 N.E. 799, 800.) In this case, dismissal would have been proper if the only claim plaintiff made was based on the failure of the Court of Claims to turn over the hearing commissioner's notes. These materials are not subject to disclosure to plaintiff. *Starnawski v. License Appeal Comm'n* (1981), 101 Ill. App. 3d 1050, 1053, 428 N.E.2d 1102, 1106; see also *Fayerweather v. Ritch* (1904), 195 U.S. 276, 306-07, 49 L. Ed. 193, 213, 25 S.

Ct. 58, 67; *United States v. Morgan* (1941), 313 U.S. 409, 422, 85 L. Ed. 1429, 1435-36, 61 S. Ct. 999, 1004-05.

However, plaintiff also alleges the Court of Claims failed to answer or resolve six specific issues which he raised to support the breach of contract claim and applied the wrong standard of review. Whether plaintiff was subject to a deprivation of due process for these reasons is not susceptible of resolution without an examination of the underlying record before the Court of Claims. For example, from the limited pleadings in the record before us, it is impossible to determine the nature, extent, and terms of the alleged contract which the University supposedly breached.

The parties agree the appropriate scope of review by the circuit court is that articulated by the supreme court in *Rossetti Contracting Co. v. Court of Claims* (1985), 109 Ill. 2d 72, 78-79, 485 N.E.2d 332, 334. On remand, the circuit court is directed to issue the writ and upon its return by the Court of Claims, to determine whether the alleged due process violations are supported by the record of proceedings from the Court of Claims.

For the foregoing reasons, the judgment of the circuit court of Sangamon County is reversed and remanded for further proceedings.

Reversed and remanded with directions.

COOK and GREEN, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

GERALD [sic] E. TANNER, Petitioner, Vs. COURT OF CLAIMS, ET AL., Defendants.	)	CASE NO. 92-L-102 (Filed FEB. 24, 1993)

MEMORANDUM OPINION

Petitioner, Gerald [sic] Tanner by Writ of Certiorari seeks review of a decision by the Court of Claims of the State of Illinois. That decision denied monetary damages for breach of contract between Petitioner and various employees of the University of Illinois.

The Defendants have filed a Motion to Dismiss the Petition alleging that Petitioner is not entitled to the relief requested; a review of the Court of Claims decision.

While the Petitioner alleges a violation of his Due Process rights a consideration of his Petition for Writ as well as the supporting documents establishes that he seeks a review of the Court of Claims decision on its merits. In *Rosetti v. Court of Claims,* 109 I11 2d 72, 485 N.E.2d 332 the Illinois Supreme Court allowed a Writ of Certiorari to require the Court of Claims to conduct a hearing. Once a hearing is held however the decision of the Court of Claims is not reviewable in the Circuit Court.

Mr. Tanner has had a full hearing pursuant to the rules of procedure of the Court of Claims. That he disagrees with that ruling does not mean that his due process rights have been violated. Mr. Tanner cannot ask the Circuit Court to review the Court of Claims decision and accordingly the Motion to Dismiss is granted.

Enter February 23, 1993

/s/ Stuart H. Shiffman
STUART H. SHIFFMAN
ASSOCIATE CIRCUIT JUDGE

cc: AAG Terrence Corrigan
James Martineus

APPENDIX D

COURT OF CLAIMS
STATE OF ILLINOIS

GERARD E. TANNER, Claimant, vs. THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, a Public Corporation, Respondent.	)	No. 78-CC-1103 (Filed Dec. 7, 1990)

OPINION UPON DENIAL OF PETITION FOR REHEARING

THIS matter comes before us on the Claimant's Petition for Rehearing.

The Petition for Rehearing asserts that 1) the Claimant's inability to access the Commissioner's Report submitted to us prior to our Opinion constitutes a denial of due process; 2) that our Opinion failed to address the issues raised by Claimant in his Brief, and that such failure "denies the Claimant the ability to determine whether or not the merits of his claim were addressed" and that such denial constitutes a denial of due process; and 3) that specific findings of fact were not made.

Claimant did not seek oral argument on the merits of his claim prior to our Opinion although 74 Ill.Adm.Code 790.210 provides for such argument by indicating the request on the party's brief. He did, however, seek oral argument on the Petition and such argument was granted

and heard. Claimant and Respondent also were granted leave to file additional written memoranda after oral argument.

As to Claimant's first assertion, he has neither a statutory or [sic] constitutional right to review the Commissioner's Report. *Starnowski v. License Appeal Commission of the City of Chicago,* 101 Ill.App.3d 1050, 428 N.E. 2d 1102 (1981). As in *Starnowski,* we are not bound by the Commissioner's Report, which is nothing more than a recommendation and as our Opinion recited, it was based upon our examination of the entire record. Claimant has cited no case authority for his proposition, and we are unaware of any such authority.

As to his second contention, our Opinion sufficiently addresses the issues raised, and Claimant has not demonstrated "points supposed to have been overlooked or misapprehended by the Court" that would result in the granting of his claim.

Claimant has asserted that we have decided this case as if it were founded in mandamus rather than breach of contract. Claimant is mistaken. Our Opinion began "Claimant brings this action for an alleged breach of contract . . . " and thereafter stated "(a)fter examination of the record, we conclude that the claim should be dismissed."

We note that while not raised in his Petition for Rehearing, Claimant asserts in his post-oral argument memorandum that we have "no authority to interpret the law." In that regard, he asserts that we adopted the mandamus standard rather than the breach of contract

standard. Inasmuch as this grounds [sic] was not raised in the Petition for Rehearing, it will not be considered.

Similarly, Claimant raises, after oral argument, and not in his Petition for Rehearing, alleged violations of the Administrative Procedures Act (Ill.Rev.Stat. 1987, ch. 127, par. 1001-1020). Inasmuch as this matter was not raised in the Petition for Rehearing, it will not be considered.

In conclusion, we have re-examined the record and our Opinion. Our conclusion is that Claimant was required, as found by the Appellate Court and quoted by us (page 5), to pass the preliminary examination and that an oral examination was a component of that preliminary examination. Claimant did not successfully comply with that requirement.

IT IS THEREFORE ORDERED that the Petition for Rehearing is DENIED.

ENTER: /s/ Andrew M. Raucci
JUDGE

CONCURRING:

/s/ James S. Montana Jr., J.

/s/ Anne M. Burke, J.

/s/ Randy Patchett, J.

THE DATE STAMPED HEREON IS THE FILING DATE FOR THIS ORDER.

APPENDIX E

IN THE COURT OF CLAIMS
STATE OF ILLINOIS

GERARD E. TANNER, Claimant, vs. THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, a Public Corporation, Respondent.	)	NO. 78-CC-1103 (Filed May 9, 1989)

OPINION

Erwin, Martinkus, Cole & Ansel, Ltd., Champaign, by James A. Martinkus, for Claimant. Thomas, Mamer & Haughey, Champaign, by William J. Brinkmann, for Respondent. RAUCCI, JUDGE, delivered the Opinion for the Court

Claimant brings this action for an alleged breach of contract against the University of Illinois because of the failure of the University to grant him the Degree of Doctor of Philosophy (Ph.D).

Claimant was accepted in September of 1971 as a graduate student in the field of Management Science. The road to the Ph.D. degree encompassed 1) the successful completion of coursework 2) completion of preliminary examinations and 3) preparation and defense of a thesis topic and dissertation.

Claimant maintains that he successfully completed all three (3) stages. The Respondent maintains that he successfully completed only the first stage.

The required course work was completed by Claimant in January, 1973. The usual comprehensive examination of course work was waived. Graduate student handbooks during the years Claimant was in this program refer to both written and oral preliminary examinations as necessary to obtain the degree of Doctor of Philosophy in business. Claimant has been required to take both a written and oral preliminary examination. Oral examinations, as a part of the preliminary examinations, have always been required of students in Management Science.

The purpose of a preliminary examination committee is to determine whether the student has demonstrated his competence to be admitted to candidacy for the dissertation phase of the Ph.D. Degree Program. In 1971, in the Management Science Group, the preliminary examination consisted of both written and oral examinations before the preliminary examination committee.

The Claimant selected his preliminary examination committee consisting of Professors Marathe, Rom and Roberts and the committee came together informally about December of 1972. Of the three professors, only Dr. Roberts was still at the University of Illinois at the time of trial and is currently a Professor in the Department of Business Administration. The preliminary examination committee gave the Claimant a written preliminary examination in December, 1972 and March, 1973. The members of his preliminary examination committee testified that

he did not do well on this examination; however, since it was not a pass/fail examination, the Claimant was allowed to continue to the oral portion of the examination process.

During attempts to schedule the oral examination, Claimant was working in Chicago, pursuant to permission from the graduate school, and was not available most of the time. Professor Roberts was also out of town during the summer of 1973.

The first oral examination was held August 25, 1973. Claimant could not answer some of the questions and testified that his mind went blank. Claimant did not feel he had performed satisfactorily and neither did his preliminary examination committee. However, his committee did not fail him and decided to give him another opportunity because they could not pass him. At the second oral examination held in October 1973, Claimant did even worse than on the first oral examination. Claimant did not perform well enough to be passed by the committee. The examination was again adjourned and the committee decided to give him yet another opportunity to show he was qualified. At the second oral examination, Claimant claimed that Professor Roberts mistreated him and acted in a bizarre fashion. The professors who were present and made up the preliminary committee denied these accusations.

The preliminary examination committee still did not fail Claimant, but decided to give him another chance. Claimant was offered an alternative to another oral examination. He could prepare a paper and present it orally on

either one of two selected topics before a graduate seminar in Management Science. Claimant refused this offer.

Claimant believed that Professor Roberts was hindering his progress and complained to Professor Uhl, Department Head, and requested the removal of Professor Roberts from the preliminary examination committee. Professor Roberts was removed and replaced with Professor Zangwell, who was apparently satisfactory to the Claimant.

The Respondent continued to exhaustively cooperate with Claimant in the desire to allow him to complete his examinations. Because of Claimant's attitude, the relationship between him and Respondent deteriorated to the point where Claimant filed a lawsuit, despite numerous efforts by Respondent to accommodate Claimant.

The examination committee reported to the graduate college October 21, 1975 that Claimant not be recommended as a suitable candidate for the doctorate degree and that he had failed his preliminary examinations. Claimant was so notified October 27, 1975 by Professor Uhl, Department Head.

A mandamus suit tried in the Circuit Court of Champaign County alleged the existence and breach of an agreement between Claimant and the University of Illinois. This complaint further alleged that the University abused its discretion and acted arbitrarily and capriciously in failing to award the degree. The complaint further alleged that the University failed to perform under the terms of its agreement with Claimant. The Circuit Court, Judge James N. Sherrick, found and

ordered that Claimant was required to pass the preliminary examination before becoming a candidate for obtaining the Doctor of Philosophy degree sought. He further found and ordered that Claimant did not show that he successfully completed the oral preliminary examination and was a successfully competent candidate for the Ph.D. degree. Judge Sherrick also found that the University did not act in bad faith in refusing to award Claimant the Ph.D. degree in Business Administration. The mandamus action was dismissed.

The record before this Court includes the record in the Circuit Court mandamus case and the Appellate Court record, as well as the Appellate Court Opinion in *Tanner v. Board of Trustees of the University of Illinois*, 76 Ill. Dec. 687, 459 N.E. 2d 324, (1984) (Tanner II). Additionally, depositions, transcripts, exhibits and filings of the parties comprise the record which exceeds two feet. After examination of the record, we conclude that the claim should be dismissed.

The record establishes clearly that the heart of this dispute is Claimant's inability to comply with the University's procedures and practices.

Whether those procedures and practices are perfect or meet Claimant's sense of "fairness" is not relevant. The General Assembly has empowered the University's Board of Trustees to issue degrees "on recommendations of the faculty" or "such as the trustees may deem appropriate." Ill. Rev. Stat. (197), ch. 144, par. 31. This provision, which has been in our statutes unchanged since 1877, has been interpreted as conferring a discretionary and not mandatory duty to issue degrees to persons participating in its

curriculum. In the absence of malicious conduct, or arbitrary and capricious action, Claimant cannot recover. We find that the facts in this case do not constitute malicious conduct or arbitrary and capricious action. *Tanner v. Board of Trustees of the University of Illinois*, 48 Ill. App. 3d 680, 363 N.E.2d 208, 6 Ill. Dec. 679 (1977) (Tanner I).

Like the trial judge in *Tanner II*, who stated:

> "I think the evidence supports the University's position that actually he had not done well; he had not indicated on those exams that he was a competent candidate for the Ph.D. degree. . . . I think the evidence indicates the University did not act in bad faith. I don't think they arbitrarily refused to award the degree. In fact, I think if the University is to be criticized, it's for being that lenient in offering a degree and you begin to wonder well, just how important . . . or what does a Ph.D. degree mean if you can get it maybe in this fashion.

In affirming the trial court in *Tanner II*, (459 N.E.2d at 326-327), the Appellate Court stated:

> "The evidence showed that the program for obtaining a degree of Doctor of Philosophy usually has three stages. . . . In the second stage, the candidate undergoes preliminary examinations to determine whether the candidate is knowledgeable in his selected field and likely to be able to write a worthwhile thesis . . .
>
> * * *
>
> Here, plaintiff admitted at trial that before he started the preliminary examination process, the faculty had explained to him and he understood that part of the preliminary examination would

be oral. He proceeded with the preliminary examination process without complaint as to this requirement and the faculty continued to work with him on this basis. Thus, any original contract between the parties that included the terms of the catalog was modified by plaintiff's tacit assent to the proposed procedure. Substantial evidence was presented that in practice the department of Business did require an oral examination as part of the preliminary examination. On the basis of the foregoing evidence the trial court (1) did not abuse this discretion in finding that defendant did require oral examination as part of the preliminary examination, and (2) was not prohibited from imposing the requirement."

While Respondent has urged that the doctrine of collateral estoppel compels us to accept these prior findings, we have made our own examination of the record in those cases and the instant one. We come to the same conclusion as to the Circuit and Appellate Courts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Claim is DISMISSED and forever barred.

ENTER: /s/ Andrew M. Raucci
JUDGE

CONCURRING:

/s/ James Montana, Jr. J.

/s/ Kirk W. Dillard J.

/s/ Anne M. Burke J.

THE DATE STAMPED HEREON IS THE FILING DATE OF THIS ORDER.